No. 95-239

In The

Supreme Court of the United States

October Term, 1995

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, and H.O.M.E., INC.,

Petitioners,

v.

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., and ALBERT MOORE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the United States Constitution guarantee that all citizens have a fundamental constitutional right to "participate equally in the political process"?

2. If there is indeed a fundamental constitutional right to "participate equally in the political process," does a municipal charter amendment violate that right when it merely prohibits the municipal government from creating "minority or protected status, quota preference or other preferential treatment" for "homosexuals, lesbians or bisexuals"?

3. Do gays, lesbians and bisexuals constitute a quasi-suspect class?

4. Is a municipal charter amendment which merely prohibits the municipal government from creating "minority or protected status, quota preference or other preferential treatment" for "homosexuals, lesbians or bisexuals" rationally related to legitimate government interest?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

In 1991 and 1992 the City of Cincinnati passed two Ordinances that were aimed at providing certain groups of people with specific redress for alleged acts of discrimination. The foremost examples of these Ordinances were Ordinance number 79-1991 (hereinafter "EEO") and Ordinance number 490-1992 (hereinafter "HRO"). The EEO made it illegal to discriminate on the basis of "sexual orientation" in hiring City employees and in making appointments to City Boards and Commissions. The HRO made it illegal to discriminate on the basis of sexual orientation in the areas of private employment, public accommodation, and housing. [1]

In response to these measures, a group of private individuals formed an organization called "Take Back Cincinnati" which later changed its name to "Equal Rights Not Special Rights." One of the main priorities of this group was to collect sufficient signatures to place a Charter Amendment, which later became commonly known as Issue 3, on the ballot of the next general election.[2] The group was successful in obtaining the requisite

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[1] City Council has since repealed the portion of the HRO forbidding discrimination on the basis of sexual orientation. Therefore, as petitioners correctly concede, the impact of Issue 3 on that measure is moot.

[2] The City of Cincinnati is a Charter Municipality organized and operating pursuant to the Home Rule provisions of Ohio's State Constitution. In a Charter municipality, the Charter acts as a sort of local constitution. Charter provisions supersede local ordinances, and the Charter may not be amended by the local legislature, which is known as City Council. Rather, in order to amend the Charter, a majority of the voters in Cincin-

number of signatures, and Issue 3 was placed on the November 2, 1993 ballot. Issue 3 provides as follows:

> "The City of Cincinnati and its various Boards and commissions may not enact, adopt, enforce or administer any ordinance, regulation, or policy which provides that a homosexual, lesbian or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of protected status, quota preference or other preferential treatment.
>
> This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force and effect."

In reaction to the formation of Equal Rights Not Special Rights, petitioner "Equality Cincinnati" was formed. One of the primary goals of Equality Cincinnati was to defeat the passage of Issue 3. Both Equality Cincinnati and Equal Rights Not Special Rights campaigned in favor of their respective positions on Issue 3. After a hard fought battle, Issue 3 was passed into law. The vote tally was approximately 62% for passage and 38% against.

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nati must vote in favor of a proposed revision or amendment at a general or special election. A measure may be placed on the ballot by City Council itself at its own initiative, but Council must place any measure on the ballot that has received the endorsement of a prescribed percentage of electors. Ohio Constitution, Article XVIII, Sections 3, 7, 8 and 9.

Prior to Issue 3 taking effect, however, petitioners filed the present claim against the City of Cincinnati to enjoin the enforcement of Issue 3. Petitioners claim that Issue 3 violates their rights to equal protection, free speech, free association, and redress of grievances guaranteed by the First and Fourteenth Amendments to the United States Constitution. Petitioners also claim that Issue 3 is unconstitutionally vague.

On November 15, 1993, Mark Miller Thomas Brinkman, Jr., Albert Moore, and Equal Rights not Special Rights moved to intervene as defendants. On November 16, 1993, the trial Court granted petitioners' motion for a preliminary injunction. On December 27, 1993, the District Court granted the motion to intervene. On June 3, 1994, the trial Court denied motions for summary judgment filed on behalf of the City and the intervening defendants.

A trial to the Court was held and the trial Judge heard testimony from a variety of expert and lay witnesses. After the trial, the District Judge issued extensive findings of fact. The Court concluded that the proposed Charter Amendment infringed petitioners' "fundamental right to equal access to the political process" as well as their rights of free speech and association and right to petition their government for redress of grievances, which violations subjected Issue 3 to strict scrutiny. Additionally, the Court held that homosexuals as a group comprise a "quasi-suspect class." Further, the Court found that Issue 3 was insufficiently related to any legitimate governmental interest to pass muster under a rational basis analysis. Finally, the Court held that Issue 3 was also void for vagueness.

The United States Court of Appeals for the Sixth Circuit reversed the District Court's ruling in its entirety. First, the Court of Appeals noted that since the trial Court's ostensible "findings of fact" were, in reality, findings of ultimate facts and interrelated applications of law, sociological judgments, mixed questions of law and fact, and/or findings designed to support "constitutional facts", these findings were subject to plenary appellate review.

Next, the Court noted that homosexual orientation cannot be the basis for suspect classification in the context of equal protection analysis. Since homosexuals are not identifiable "on sight", those homosexuals that are affected by legislation concerning sexual orientation choose to be so affected by their conduct. Since *Bowers v. Hardwick*, 478 U.S. 186 (1986), held that homosexuals possess no fundamental right to engage in homosexual conduct, such conduct could not form the basis for suspect classification.

The Court further held that there exists no fundamental right to equal participation in the political process. The cases upon which the District Court relied for this fundamental right were, without exception, race based classification cases. Since the realization of a homosexual legislative agenda is not constitutionally guaranteed, the narrow restriction upon the political avenues available to the unidentifiable and non-protected class of homosexuals and their allies does not rise to constitutional dimensions. The Court recognized that the opponents of Issue 3 "simply lost one battle of an ongoing political dispute."

Also, the Court of Appeals noted that Issue 3 did not impermissibly burden petitioners' rights of free speech or association, nor violate petitioners' right to petition their government for a redress of grievances. Since no fundamental right was involved the Court found that the proper standard of judicial scrutiny was the "rational basis" standard. Under this highly deferential standard, social or economic legislation must be affirmed if there is any reasonably conceivable state of facts that could provide a rational basis for a classification. In other words, the party challenging the rationality of the legislation bears the burden of negating every conceivable basis for the action, regardless of whether or not such supporting rationale was cited by, or actually relied upon by the promulgating authority. The Court noted that the measure furthered numerous legitimate public purposes, and therefore, passed constitutional muster when subjected to appropriate scrutiny.

Finally, the Court of Appeals held that Issue 3 was not unconstitutionally vague. This was especially true since City Council amended the HRO to delete any reference to sexual orientation. Petitioners have not challenged the Sixth Circuit's ruling in this regard.

SUMMARY OF ARGUMENT

In the history of this democracy, there has always been a "losing" point-of-view, so to speak. The strongest underpinning of the republic has always been our willingness of the "losing" point-of-view to accept legislative defeats gracefully (non-violently), regroup, and attempt

with new and better arguments to convince the "winning" side to alter its stance. The Petitioners' suit, if successful, would radically change for the worse our cherished democratic traditions. Respondent respectfully submits that the decision of the Sixth Circuit gives due consideration to the First Amendment rights of all those citizens who voted to remove the ability of their elected and appointed municipal representatives to give additional, special, preferential treatment to a special interest group. Unlike the trial court's repudiation of this *vox populi*, the most fundamental of all rights, the Sixth Circuit's ruling prejudices no one's rights.

Respondents herein submit four reasons that this Court should deny the petition. These reasons, discussed in detail later, *infra,* are stated rather simply below.

There is no such thing as a "fundamental constitutional right to participate fully or equally in the political process." Petitioners seek to enlarge, for themselves only, the substantive due process rights that all citizens enjoy equally. The Sixth Circuit's decision is in accord with decisions by this Court which caution strongly against "tailoring novel fundamental rights." *See, e.g., Bowers v. Hardwick,* 478 U.S. 186, 195, 106 S.Ct. 2841, 2846 (1986).

Even should there be created such a novel fundamental constitutional right, it could not be offended by means of a determination by the citizens through the [state] constitutionally-guaranteed initiative and referendum process that the municipal government not create preferences or quotas to benefit only gays, lesbians and bisexuals.

Gays, lesbians and bisexuals "do not [necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group" and so, cannot constitute a "quasi-suspect classification." *Bowen v. Gilliard,* 483 U.S. 587, 602, 107 S.Ct. 3008, 3018 (1987).

A charter amendment which merely prohibits the municipal government from enacting preferences or quotas strictly for the benefit of gays, lesbians and bisexuals bears a rational relationship to legitimate government interests, which the Sixth Circuit found in abundance (a "litany," to be precise). Notwithstanding any of the above reasons, respondent also submits that this case does not represent, as petitioners suggest, an infringement upon the ability of any Cincinnati electors to petition their government for redress of grievances. Constitutional rights to initiative and referendum are held by Ohio citizens under the state's constitution. These rights may not be abridged. Issue 3 does nothing to limit these rights, and the decision by the Sixth Circuit actually reinforces the sanctity of that process. Section 1f, Article II of the Ohio Constitution provides as follows:

> "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law."

The rejection of a sufficient petition by a legislative authority constitutes an abuse of discretion. *State, ex rel. Citizens v. Widman,* 66 Ohio App.3d 286 (1990); *Heidtman v. Shaker Heights* (1954), 99 Ohio App. 415, 119 N.E.2d 644,

affirmed (1955), 163 Ohio St. 109, 126 N.E.2d 138. Sections 8 and 9, Article XVIII of the Ohio Constitution provide that upon the submission of the proper initiative petition, City Council must place the question on the ballot at the next general municipal election or at a special election called by Council. *State, ex rel. Blackwell v. Bachrach,* 166 Ohio St. 301 (1957). Council's review is limited to such matters as timeliness, regularity of signatures and form. Council is without authority to reject an initiative petition based upon claims of illegality or unconstitutionality of substantive provisions. *State, ex rel. Kittel v. Bigelow,* 138 Ohio St. 407 (1941). The charter amendment by initiative process must be liberally construed in favor of the exercise of this right by the electorate. *State, ex rel. Sharpe v. Hitt,* 115 Ohio St. 529 (1951); *State ex rel. King v. Portsmouth,* 27 Ohio St.3d 1 (1986). In fact, if an initiative proposal is delayed at the Council level due to the failure of the Council to pass in timely fashion an ordinance directing that the measure be placed on the ballot, a mandamus action will lie against Council for abuse of discretion. *State, ex rel. Jurcisin v. Cotner,* 10 Ohio St.3d 171 (1984).

The Sixth Circuit's decision supports the right of the people, guaranteed by the constitutions of both the state of Ohio and the United States of America, to exercise the initiative process. The Sixth Circuit's decision ensures that irrespective of the consideration of their sexual orientation, all Ohio and Cincinnati citizens enjoy the right to petition their government for redress of grievances. The Sixth Circuit's decision supports *equality.*

REASONS FOR DENYING THE WRIT

1. THE UNITED STATES CONSTITUTION DOES NOT GUARANTEE THAT ALL CITIZENS HAVE A "FUNDAMENTAL CONSTITUTIONAL RIGHT" TO "PARTICIPATE EQUALLY IN THE POLITICAL PROCESS."

The City respectfully submits that this Court has never recognized as "fundamental" any "right to participate equally in the political process."

Under traditional equal protection analysis, legislation that involves a suspect classification or affects a fundamental right is subject to the strict scrutiny analysis. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985). If the government cannot show a compelling state interest, legislation that involves a suspect classification or affects a fundamental right will be declared unconstitutional. *Id.* at 440. The Sixth Circuit correctly found that in this case gays, lesbians and bisexuals do not constitute a suspect classification, and that Issue 3 infringes no fundamental constitutional right.

This Court has defined "fundamental" rights to be those without which neither liberty nor justice would exist. They are freedoms essential to the concept of ordered liberty. They are inherent in human nature, and are consequently inalienable. *Palko v. Connecticut,* 302 U.S. 319 (1937) (holding that the Fifth Amendment protection against double jeopardy did not apply to the states, later overruled by *Benton v. Maryland,* 395 U.S. 784 (1969), which held that the Fifth Amendment does apply to the states). Justice Benjamin Cardozo, writing for the majority in *Palko,* found that some select protections from the

Bill of Rights were absorbed into the due process guarantee of the Fourteenth Amendment only because they were fundamental to our notions of liberty and justice. Cardozo stated that such rights imposed limits upon the states because "they represented the very essence of a scheme of ordered liberty, . . . principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." *Palko v. Connecticut*, 302 U.S. at 325. The position that "equal participation in the political process" is such a *fundamental* right and further, that it is a *fundamental* right to which gays, lesbians and bisexuals as an "identifiable group" are entitled is untenable. Such an expansive guarantee is to be found neither in the Bill of Rights nor in prevailing constitutional law. The decision of whether a right is fundamental involves a judicial determination that the text or structure of the federal Constitution evidences a value that should be taken from the control of the legislative branches of government and is best characterized as a substantive due process right. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 419 (1993) (hereinafter "*Evans I*"). See also, 3 Treatise on Constitutional Law section 18.3, at 18 n.19; *Bowers v. Hardwick*, 487 U.S. 186 (1986) (Powell, J., concurring); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (suggesting that fundamental rights must be explicitly or implicitly guaranteed by the United States Constitution). The rights are applicable to the states through the Fourteenth Amendment are also considered fundamental rights for purposes of equal protection analysis. See 3 Treatise on Constitutional Law section 18.39, at 490. The Sixth

Circuit's decision prevented the improper enlargement of substantive due process to which gays, lesbians and bisexuals as citizens are entitled. Absent the Sixth Circuit's decision, that assemblage would have accomplished exactly what the Issue 3 proponents said they would – "special" treatment.

The number of rights that this Court has found to be fundamental is limited. For example, housing, the right to refuse medical treatment, welfare payments and government employment are not among our fundamental constitutional rights. See *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (right to refuse medical treatment); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (employment); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education); *Dandridge v. Williams*, 397 U.S. 471 (1970) (welfare). See also 3 Treatise on Constitutional Law section 18.42, at 821-31. Given the precious nature of fundamental rights, "There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental." *Bowers*, 478 U.S. at 194-95. And, "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Rodriguez*, 397 U.S. at 33.

The decision of the District Court below was founded upon circular logic. The District Court relied upon the analysis of the Colorado Supreme Court in the *Evans I* case in support of their argument that gays, lesbians and bisexuals have a fundamental constitutional right to "full" or "equal" participation in the "political process." As the dissenting justice in both *Evans I* and *Evans II* (the

latter is *Evans v. Romer*, 882 P.2d 1335 (Colo.1994), *cert. granted*, 115 S.Ct. 1092 (1995), hereinafter "*Evans II*", or if referred to collectively with *Evans I*, then "*Evans I and II*") carefully pointed out, the majority opinions (in *Evans I and II*) concocted this new "fundamental right" by erroneously applying prior case law in which the unconstitutional governmental actions involved were the use of impermissible racial classifications. For example, the *Evans I* majority relied on the case *Reitman v. Mulkey*, 387 U.S. 369 (1984), yet the equal protection analysis in that case is focused solely on a racial classification drawn by a state constitutional amendment and as such, represents a traditional suspect classification analysis. The dissent in *Evans I* reported that "no court or commentator has ever viewed Reitman, either alone or in combination with other cases, as having applied fundamental right analysis." *Evans I*, 854 P.2d 1270, 1293 (1993 Colo.).

Another case relied on by the *Evans I* majority was *Palmore v. Sidoti*, 466 U.S. 429 (1984), where this Court invalidated a child custody order that had been based solely on a judicial determination that it would be harmful to a child to remain in a racially mixed household. *Palmore*, 466 U.S. at 431. Again, the dissent in *Evans I* reported that, "Like Reitman, no court or commentator has ever viewed Palmore, either alone or in combination with other cases, as having applied fundamental right analysis." *Evans I*, 854 P.2d 1270, 1293 (1993 Colo.). Similarly, an examination of the decisions in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) and *Pruitt v. Cheney*, 943 F.2d 989 (9th Cir. 1991) reveals that what was involved in those cases was the application of rational basis review.

No case relied upon by either of the majorities in *Evans I and II* involved the recognition of a "fundamental right to equal or full participation in the political process." Such a concept is a fiction created by the Colorado state court system and by the District Court in the case *sub judice*. Rather, this Court has repeatedly held that there is a fundamental right to have one's vote counted equally, which is characterized as the [fundamental] "right to vote." *Reynolds v. Sims*, 377 U.S. 533 (1964); see also 2 Treatise on Constitutional Law section 15.7, at 435; e.g., *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). This fundamental right clearly includes the right to participate in the electorial process by exercising the franchise, *Dunn v. Blumstein*, 405 U.S. 330 (1972) ("this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis"); 2 Treatise on Constitutional Law section 15.7, at 435; cf. Frank L. Michelman, Conceptions of Democracy in American Constitutional Argument, 41 Fla. L.Rev. 443, 459 n.63 (1989) (characterizing the "right to participate in elections on an equal basis" as a fundamental right) but no more.

The right to vote is not equivalent to the right to "participate" in any way, full or otherwise, in the electoral process. See generally, Lawrence H. Tribe, American Constitutional Law section 13-1, at 1062 (2d ed. 1988) (characterizing political participation rights as "rights poised between procedural due process and the freedoms of expression and isolation"). In fact, the right to vote is itself – in most states – legitimately qualified by various obstacles. Simply put, there is no fundamental right to "full participation in the political process."

Petitioners direct this Court to the case *Hunter v. Erickson*, 393 U.S. 385 (1969), as proof of their claim that there exists a fundamental right to participate equally in the political process, and argue further that Issue 3 fails the "Hunter neutral principles test" because it "harms the fundamental rights of a 'specifically identified group.' " The "group" in *Hunter* was a traditional suspect classification. In *Hunter*, this Court invalidated an Akron, Ohio city charter amendment which repealed a racial anti-discrimination ordinance and required voter approval before any such future ordinances could be enacted. *Hunter*, 393 U.S. at 387. The amendment in that case was characterized by this Court as placing "special burdens on racial minorities within the governmental process," *id.* at 391. This Court viewed the issues in *Hunter* as racial issues, not as "political participation" issues. The Sixth Circuit and the dissent in both *Evans I and II* identified this distinction and concluded logically that this court has never recognized such a broad-based fundamental right. Appendix to Petition (hereinafter "*App.*") at 15a - 17a. *Evans I*, 854 P.2d 1270 (1993 Colo.); *Evans II*, 882 P.2d 1335 (Colo. 1993).

Decisions from this Court and from the Sixth Circuit subsequent to *Hunter* bolster this interpretation. *James v. Valtierra*, 402 U.S. 137 (1971); *Gordon v. Lance*, 403 U.S. 1 (1971); *Washington v. Seattle School Dist. No. 1*, 4588 U.S. 457 (1982). See also *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986); *Jaimes v. Toledo Metropolitan Housing Authority*, 758 F.2d 1086 (6th Cir. 1985); *Brinkman v. Gilligan*, 503 F.2d 684 (6th Cir. 1974); *Johnson v. Railway Express Agency, Inc.*, 489 F.2d 525 (6th Cir. 1973); *Bradley v.*

Milliken, 433 F.2d 897 (6th Cir. 1970); *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969).

The *James* case concerned the validity of a California state constitutional measure prohibiting public bodies from developing, constructing, or acquiring low-income housing projects until voters approved the project in a referendum. The federal district court relied on *Hunter* to find that the constitutional measure violated the Equal Protection Clause. This Court did not apply the strict scrutiny standard of review, and found that the measure did not offend equal protection, writing that:

> "Unlike the case before us, Hunter rested on the conclusion that Akron's referendum law denied equal protection by 'placing special burdens on racial minorities within the governmental process.' . . . Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on 'distinctions based on race.' . . . *The present case could be affirmed only by extending Hunter, and this we decline to do.*"

Id. at 140-41 (emphasis added).

Before this Court, the appellees in *James* asserted that the mandatory referendum required by the constitutional amendment "hampered persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage." *James*, 402 U.S. at 142. The plaintiffs in *James* were an actual, identifiable group who claimed that a constitutional amendment had the effect of "fencing them out" from the normal political process. Respondent submits that the Sixth Circuit applied to their decision the same logic used by this Court in the *James*

case, and properly rejected the notion that Issue 3 offends equal protection. As this Court held in *James*:

> "Of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people."

Id. See also, the dissenting opinion in *Evans II*, 882 P.2d 1335 (Colo. 1993).

Petitioners cite the Sixth Circuit's decision in *Taxpayers United For Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993), in support of their contentions that: (1) a mere identifiable group is a suspect class; and (2) "disparate impact" is a sufficient basis to invalidate the will of the electorate. The Sixth Circuit correctly found that the *Taxpayers United* decision does not, in truth, advance such claims. In that case, the plaintiffs alleged that their First and Fourteenth Amendment rights were violated when the Michigan Board of State Canvassers refused to certify their proposed initiative for submission. Specifically, plaintiffs contended that they had been denied their right to vote and their rights to assemble and to engage in political speech. They also raised due process and equal protection challenges, and argued that the state had to

present a compelling state interest in order to preserve its procedure for reviewing the validity of initiative petitions. *Id.* at 293-94. The District Court rejected these contentions, held that the plaintiffs had failed to state a claim upon which relief could be granted, and dismissed the case. The Sixth Circuit, in upholding the action of the district court, pointed out that although this Court has on a number of occasions held that the *right to vote* is a fundamental right, *id.* at 296, citing, e.g., *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964); "the plaintiffs do not cite to us nor does our research identify any decision of the Supreme Court or a lower federal court *holding that signing a petition to initiate legislation is entitled to the same protection as exercising the right to vote.*" *Taxpayers United*, 994 F.2d at 296 (emphasis added). The Sixth Circuit also cited a Georgia district court decision which stands for the position that although a state may not discriminate on the basis of suspect classifications such as race, the actions of state officials [in excluding certain signatures on initiative petitions] was permissible so long as those actions were not based on suspect classifications. *Id.*, citing *Kelly v. Macon-Bibb County Bd. of Elections*, 608 F.Supp. 1036 (M.D. Ga. 1985). Finally, in the *Taxpayers United* case, the Sixth Circuit rejected the plaintiffs' claims that they were being denied rights to freedom of speech and political association, holding that the Michigan system was constitutional also because it "does not restrict the means that the plaintiffs can use to advocate their proposal." *Taxpayers United*, 994 F.2d at 297. As the case before the District Court demonstrated completely, petitioners have not been denied the right to vote. Petitioners have not been

denied the right to organize and to engage in political speech. Petitioners have not been denied the right to change the Charter of the City of Cincinnati by the same methods used by the electorate of this City for decades. *The change to the charter is a reflection of the strong interest of the government in ensuring that proposals are not submitted for enactment into law unless they have sufficient support. Anderson v. Celebreeze,* 460 U.S. 780 (1983). So long as the people do not impinge upon the rights of a suspect or quasi-suspect class, and do not affect the fundamental right *to vote,* their actions should be accorded deference. Petitioners in this case are treated no differently than any other group when it comes to changing the charter. The people have only determined that "No *special* class status may be granted based upon sexual orientation, conduct or relationships" and that, "The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of *minority or protected status, quota preference* or other *preferential* treatment" as a matter of Charter. The Sixth Circuit properly found that in no way can this be construed as a ban on speech, or a denial of the right to vote to a non-suspect class, or the infringement of any other constitutionally-guaranteed right (fundamental or otherwise). As the Sixth Circuit relates in its decision in this case, the *Taxpayers United* decision stands for the ruling that, "unlike voting, the 'right' to sign an initiative petition, and the 'right' to obtain certification of

a proposed initiative, are not fundamental, thereby deciding by necessary implication that non-voting forms of political activity are not categorically fundamental." *App.* at 17a.

This Court has consistently refused to apply the protections necessary for racial and religious minorities to achieve equality to others who claim merely to be "identifiable groups." Such a standard does not exist. Although petitioners successfully convinced the District Court to include themselves in that body of citizens whose ranks include Dr. Martin Luther King, the Reverend Jesse Jackson, and countless others, the Sixth Circuit was not deceived. Try as they might, petitioners simply are not members of that group, and should not be permitted to point to the civil rights movement to buttress their own causes. The Sixth Circuit's ruling is a sound one. Inasmuch as there is no fundamental right at issue here, this Court should decline to hear this case.

2. EVEN IF THERE IS INDEED A "FUNDAMENTAL CONSTITUTIONAL RIGHT TO PARTICIPATE EQUALLY IN THE POLITICAL PROCESS", A MUNICIPAL CHARTER AMENDMENT DOES NOT VIOLATE THAT RIGHT WHEN IT MERELY PROHIBITS THE MUNICIPAL GOVERNMENT FROM CREATING "MINORITY OR PROTECTED STATUS, QUOTA PREFERENCE OR OTHER PREFERENTIAL TREATMENT" FOR "HOMOSEXUALS, LESBIANS OR BISEXUALS."

An examination of the plain and ordinary meaning of Issue 3 reveals that the most basic premise of petitioners'

case stands in stark contrast to reality. That "basic premise" is that Issue 3 prevents the City from enacting any anti-discrimination laws that will benefit that portion of the municipal citizenry that is "homosexual, lesbian or bisexual." This premise was correctly recognized by the Sixth Circuit as seriously flawed.

Although subsequently modified so that references to "sexual orientation discrimination" were deleted, the HRO in existence at the time the Issue 3 Charter amendment was adopted prohibited discrimination based upon "sexual orientation" in the areas of private employment, public accommodations and housing. *App.* at 23a. Although the District Court correctly found that all sexual orientation discrimination was banned by the HRO, it went on to conclude incorrectly that Issue 3 not only acts definitively to repeal the HRO but also puts in place a Charter mechanism which "prevents" the City from prohibiting sexual orientation discrimination against homosexuals, lesbians and bisexuals. *App.* at 53a-54a, 77a-84a.

Prohibitions against discrimination on the bases of race, gender, etc. have never been found to accord any members of a subset of those groups (the "protected classes") "special" or "privileged" treatment. The conduct which is proscribed is the discrimination on the basis of the characteristic identified in the statute. The statute is not to be construed as "specially" or "preferentially" preventing discrimination against any identifiable subset within the statutory classification. For example, statutes prohibiting discrimination on the basis of race do not provide a specifically identifiable protection for African-Americans.

The only line of cases in which certain classes have been found to have received "special" rights are the affirmative action cases such as *City of Richmond v. Croson*, 488 U.S. 469 (1989) and *Bd. of Regents v. Bakke*, 438 U.S. 265 (1978). In that line of cases, this Court consistently held that the creation of special rights, such as quotas and set-aside programs, violates the Equal Protection Clause unless supported by specific legislative findings indicating past patterns of discrimination and detailed findings that the remedy fashioned by the legislative body was narrowly tailored to combat such discrimination. See, *Croson*, 488 U.S., at 498-99. This standard, as applied to racial classifications in *Croson* and *Bakke*, has been applied as well to gender-based classifications. See *F. Buddie Contracting Co. v. City of Elyria*, 773 F.Supp. 1018 (N.D. Ohio 1991). Thus, the Equal Protection Clause itself has been found to prohibit the granting of "special" or "privileged" treatment except in very narrowly defined circumstances.

As such, any provision, such as Issue 3, that purports to preclude special protection for any specified subset of a protected class would accomplish no more than the Equal Protection Clause has been held to require in the above-cited line of cases. As no special treatment for an identifiable subset of a given classification can be conferred by a general anti-discrimination provision, a voter initiative that forecloses such special treatment is at most duplicative of the dictates of the Equal Protection Clause and therefore in effect a nullity. Simply put, the voter initiative cannot "repeal" a protection that cannot have

been properly accorded by the prior enactment. Therefore, it is quite likely that Issue 3 did not act to repeal the HRO and the EEO ordinances. Respondent's position is that whether or not Issue 3 repealed those ordinances, it is a valid exercise in self-government.

3. GAYS, LESBIANS AND BISEXUALS DO NOT CONSTITUTE A QUASI-SUSPECT CLASS.

The Sixth Circuit cited this Court's decision in the case *Bowers v. Hardwick*, 478 U.S. 186 (1986), in support of the position that gays, lesbians and bisexuals do not constitute a "suspect class" or "quasi-suspect class." *App.* 10a-15a. This position is not unique. Courts have consistently rejected claims that an identifiable group of homosexuals constitutes a suspect class. See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (concluding that homosexuals are neither a suspect nor a quasi-suspect class); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (same), cert. denied sub nom. *Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989) (same), cert. denied, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (same); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270 (10th Cir. 1984) (same), aff'd., 470 U.S. 903 (1985); *Steffan v. Cheney*, 780 F.Supp. 1 (D.C. 1991) (same), *rev'd*, 8 F.3d 57 (D.C. Cir. 1993), *reversal vacated pending rehrg. en banc*, 8 F.3d, at 70 (1/7/94). In fact, the dissenting judge in *Evans I*, 854 P.2d 1270, 1288 (1993 Colo.) stated that, "A number of states continue to classify the conduct that defines the class as criminal behavior." *Id.* That judge went on to cite laws from such states,

including two states in the Sixth Circuit: Kentucky and Michigan.

In the case *Steffan v. Cheney*, 780 F.Supp. 1 (D.C. 1991), Midshipman Steffan sought to distinguish the previous court decisions which held that gay men and lesbians do not constitute either a "suspect" or "quasi-suspect" classification. Steffan argued that while previous cases had clearly involved some sort of homosexual conduct, in his case the government action was predicated upon his status as a homosexual. *Steffan v. Cheney, Id.*, at 4. The Court rejected this argument, and concluded that he was not a member of either a "suspect" or a "quasi-suspect" class. *Id.* at 10. Applying a rational basis analysis to the government policy in question, the Court upheld the constitutionality of the proscription. *Id.* at 16.

In reaching this conclusion, the *Steffan* Court considered many of the same arguments heard by the District Court in this case. Applying the analysis undertaken on past occasions by this Court, the District Court in *Steffan* found that: (1) while homosexuals have suffered a history of discrimination, there was no "gross unfairness" which in context was "so inconsistent with equal protection as to be termed 'invidious' " (*id.* at 5, quoting *Ben-Shalom v. Marsh*, 881 F.2d 454 (footnote omitted) (7th Cir. 1989) (same), cert. denied sub nom. *Ben-Shalom v. Stone*, 494 U.S. 1004 (1990)); (2) homosexuals do not possess any obvious, immutable or distinguishing characteristics that define those with a homosexual orientation as a discrete or separate group (*Steffan v. Cheney, id.* at 5-6); (3) "homosexual orientation is neither conclusively mutable nor immutable since the scientific community is still quite at sea on the causes of homosexuality, its permanence, its

prevalence, and its definitions" (*Id.* at 6) and; (4) homosexuals "clearly" enjoy "a good deal of political power in our society, not only with respect to themselves, but also with respect to issues of the day that affect them" (*Id.* at 7-8). For brevity's sake, let it be said only that the court in *Steffan* also went into great detail when applying facts and data to support its conclusions, unlike the District Court in this case. Unquestionably then, the District Court in the case at bar erred when it found that the plaintiffs constitute a "quasi-suspect" class. The Sixth Circuit properly corrected that error, and since there is no "quasi-suspect" classification issue here, the rational basis test that should have been applied to Issue 3 by the District Court, but was instead applied by the Sixth Circuit, reveals that rational bases do indeed exist for such a measure. These bases are detailed below.

4. A MUNICIPAL CHARTER AMENDMENT WHICH MERELY PROHIBITS THE MUNICIPAL GOVERNMENT FROM CREATING "MINORITY OR PROTECTED STATUS, QUOTA PREFERENCE OR OTHER PREFERENTIAL TREATMENT" FOR "HOMOSEXUALS, LESBIANS OR BISEXUALS" IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL INTEREST.

The government has, at a minimum, a legitimate interest in ensuring that proposals are not submitted for enactment into law unless they have sufficient support. *Anderson v. Celebreeze*, 460 U.S. 780 (1983); *Taxpayers United For Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993). This is part of the state's interest in ensuring that its elections are run fairly. *Anderson*, 460 U.S. at 788.

Issue 3 is, at a minimum, rationally related to the legitimate interest of government in ensuring that there is sufficient support for proposals that would create quotas or other preferential treatment, minority or protected status for this special interest group.

Issue 3 does not prevent lesbian, gay and bisexual Cincinnatians, but no others, from obtaining legal protection, as petitioners claim. Rather, Issue 3 merely requires people in favor of a particular political view to establish that a majority of the community also supports that view. In this case, it is abundantly clear that Cincinnatians do not wish to empower their municipal legislators or any other appointed municipal governmental representatives to enact laws or policies which would create quotas or other preferential treatment, minority or protected status for this special interest group.

Petitioners fall far short of the mark in their attempts to distinguish *Gordon v. Lance*, 403 U.S. 1 (1971) by claiming that no identifiable group was impacted by the West Virginia Constitutional provision which required a 60 percent affirmative vote in a referendum election in order for the state to incur bonded indebtedness or to increase tax rates. Their reasoning in this regard is not compelling. Certainly the residents of Roane County who favored the contested bond issue and tax levy were "identifiable" in some sense of the word based upon their position on the levy and bond issues. In other words, their stance on that issue distinguished them from voters with the opposite view. They could be identified by reference to the way that they had voted in the election.

In this way they were similar to the opponents of Issue 3. Petitioners did not contend, and the trial court did not find, that 38 percent of the voting population of Cincinnati was gay, lesbian or bisexual. Rather, the only identifiable characteristic of the opponents of Issue 3 is their stance on Issue 3, evidenced by their voting preference. This was also true in *Gordon*. The crucial determination of this Court in *Gordon* was not whether the plaintiff group could be identified but rather, whether the challengers of the provisions were a "discrete and insular minority" singled out for special treatment; or whether they were denied access to the ballot because of some extraneous condition such as race. *Gordon*, 403 U.S. at 5. Having determined the answers to these questions were in the negative, this Court upheld the Constitutional provision.

Also, proponents of Issue 3 would say that public morality is implicated in Issue 3. It is not unlikely that Issue 3 was viewed by its proponents as a means of voicing disapproval of certain conduct and lifestyle choices of homosexuals, bisexuals and lesbians. After all, as described above, Issue 3 does add a degree of difficulty for those who believe that these groups should be specially protected to get legislation enacted to effectuate their goals. However, as this Court noted in *Bowers v. Hardwick*, 478 U.S. 186 (1986):

> "[R]espondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing

> essentially moral choices are to be invalidated . . . the courts will be very busy indeed."

Id.

If, and when a majority of Cincinnatians believe that a group of their fellow citizens is being so unfairly treated that action is necessary, respondent respectfully submits that an amendment to the City's Charter designed to remedy that unfair treatment would pass by as wide a margin as Issue 3 did in November of 1993. That is the way that the American system is supposed to work. It is absurd and offensive to assert, as petitioners have done, that a majority of Cincinnatians are "homophobic" and actually want to discriminate against them. The truth is, most Cincinnatians simply disbelieve the notion, espoused by petitioners, that gays, lesbians and bisexuals suffer invidiously, daily, and incessantly due to their status or conduct. As the previous court decisions indicate, there is so much that is unknown about what precipitates homosexual status or conduct that the City urges this Court to hold that it is simply not jurisprudentially sound to adopt the opinions on the subject offered by the plethora of available "experts." Under prevailing law, gays, lesbians and bisexuals are not, and should not be considered to be, a "quasi-suspect" classification. Further, by any common-sense consideration, the interests articulated by the respondent satisfy any degree of scrutiny applied to Issue 3, to the extent that the Court's consideration necessarily extends beyond a traditional rational basis analysis.

CONCLUSION

For all of the above reasons, the petition for a writ of *certiorari* should be denied in this matter. The decision of the United States Court of Appeals for the Sixth Circuit should stand. There is neither a "quasi-suspect class" issue nor does the charter amendment intentionally prevent from exercising a "fundamental" right. *Washington v. Davis*, 426 U.S. 229 (1976). Clearly, under prevailing law neither homosexuality nor bisexuality entitle these petitioners to claim that they belong to a quasi-suspect class. Likewise, in its decision the Sixth Circuit reaffirmed that most basic of all rights guaranteed by the federal constitution, namely: that Americans have the inalienable right to determine how they are governed.

Respectfully submitted,

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